23

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IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 301

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,

Petitioners,

vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM T. FARICY,
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Attorneys for Petitioners.

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Chicago, Illinois,
Of Counsel.

November 4, 1942.

MC CORMICK AND HENDERSON, INC., CHICAGO

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Come now Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, the United States Trust Company of New York, as Trustee under the General Gold Bond Mortgage of the Chicago and North Western Railway Company, and James E. Lockwood, Jr., petitioners in the above entitled cause, and file this petition for a rehearing of their petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, and in support thereof, respectfully show:

I.

In the petition for a writ of certiorari filed herein on August 14, 1942, the questions presented were stated as follows (p. 6):

1. Under Illinois law, did the Camp deed convey only a right of way easement or did it convey a greater estate?

2. Even if the deed conveyed only a right of way easement, under Illinois law, is the temporary leasing of part of the property conveyed for a gasoline filling station a proper use?

II.

At this time, we wish to direct particular attention to the second question stated above and to advise the Court that a like question is awaiting decision by the Appellate Court of Illinois, Third District. The case is entitled *Mitchell* v. *Illinois Central Railroad Company, a corporation, and W. E. Beach, doing business as Illinois Independent Oil Company,* and is docketed as Number 9356. It was presented orally before the Appellate Court on October 7th, 1942, but, to date, no decision has been handed down. In that case, the Appellate Court is reviewing a decree of the Circuit Court of Mason County, Illinois, which denied the plaintiff an injunction against the Illinois Central Railroad Company and its lessee to whom it has leased a part of its right of way for a bulk and retail gasoline station. This lease is terminable upon sixty days' notice. The title of the Illinois Central to the leased property is an easement for railroad purposes. The decree of the Circuit Court of Mason County is based upon a written opinion of that Court. The petitioners did not learn that the *Illinois Central* case had been appealed until after the petition for writ of certiorari was denied herein on October 12th, 1942.

III.

In the case at bar, the petitioners have consistently urged that the Railway Trustee holds fee title to the leased property but, if this is not correct, the case at bar must be said to be strikingly similar to the pending *Illinois Central* case to which reference has just been made. This similarity can be readily seen by referring to the summary statement of the matter involved in the petition for writ of certiorari herein and also by referring to the Circuit Court of Appeals' second opinion where it is said (R. 212):

> "In 1937 the Railroad leased a portion of its right-of-way to James E. Lockwood for a 'bulk oil station and retail filling station.' The lease contained a clause empowering either party to terminate the lease by giving 30 days' notice, and excepted and reserved from its operation a strip of land 17 feet wide (or 8½ feet on each side of the tracks)."

The Circuit Court of Appeals in beginning its discussion of the question of the propriety of the use of the leased property in the present case said (R. 224):

> "The distinction between what is a proper and an improper use is not always clear and is often a question requiring nice discriminations."

We endeavored to demonstrate to this Court in our brief in support of the petition for writ of certiorari (pp. 20-24) that even if the Camp deed conveyed only a right of way easement, under Illinois law, the temporary leasing of part of the property for a gasoline filling station was a proper use. In this, we were not successful. We respectfully submit, however, that inasmuch as the issue is to be decided by the Illinois Court, the decision of the Circuit Court of Appeals should be reviewed. The question is of great im-

portance not only to these petitioners but to a number of railroads in the State of Illinois.

For the foregoing reasons, your petitioners respectfully urge that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

WILLIAM T. FARICY,
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LOWELL HASTINGS,
Attorneys for Petitioners.

STANTON E. HYER,
SIDNEY K. JACKSON,
NELSON J. WILCOX,
Of Counsel.

November 4, 1942.

CERTIFICATE OF COUNSEL.

I, LOWELL HASTINGS, one of the attorneys for the petitioners in the above entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay.

LOWELL HASTINGS,
Attorney for Petitioners.